Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1993

FOXMEYER DRUG COMPANY,

PETITIONER,

v.

COOPERS & LYBRAND,

RESPONDENT.

In re FOXMEYER DRUG COMPANY,

PETITIONER.

BRIEF FOR COOPERS & LYBRAND IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT and in the alternative PETITION FOR COMMON-LAW WRIT OF CERTIORARI, AND FOR WRIT OF MANDAMUS TO HONORABLE DONALD E. ZIEGLER, UNITED STATES DISTRICT JUDGE FOR THE WESTERN DISTRICT OF PENNSYLVANIA

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Third Circuit abused its discretion in declining mandamus to take this case out of the normal appellate scheme, which contemplates review of jurisdictional and other rulings and correction of any errors on appeal from final judgment.

2. Whether a civil proceeding is "related to" a bankruptcy case within the meaning of 28 U.S.C. § 1334(b), so as to vest a federal court with subject matter jurisdiction, where the proceeding may affect property coming into the bankruptcy estate, may affect distribution of the Debtor's assets among creditors, and involves joint conduct by the Debtor and the Defendant.

JURISDICTION

Although Petitioner invokes 28 U.S.C. § 1254(1) as its first jurisdictional basis, reliance on this section is rendered questionable by the provisions of 28 U.S.C. §§ 1452(b) and 1334(c), which state that remand and abstention decisions (such as the District Court decision at issue here), "shall not be reviewable by appeal or otherwise . . . by the Supreme Court of the United States under section 1254 of this title." Further, as set forth below, mandamus review under 28 U.S.C. § 1651 has never been allowed in cases involving lower court denials of remand and/or abstention.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 1334. Bankruptcy cases and proceedings

(b) Notwithstanding any Act of Congress that confers exclusive jurisdiction on a court or courts other than the district courts, the district courts shall have original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases under title 11.

28 U.S.C. § 1452. Removal of claims related to bankruptcy cases

(a) A party may remove any claim or cause of action in a civil action other than a proceeding before the United States Tax Court or a civil action by a governmental unit to enforce such governmental unit's police or regulatory power, to the district court for the district where such civil action is pending, if such district court has jurisdiction of such claim or cause of action under section 1334 of this title.

(b) The court to which such claim or cause of action is removed may remand such claim or cause of action on any equitable ground. An order entered under this subsection remanding a claim or cause of action, or a decision to not remand, is not reviewable by appeal or otherwise by the court of appeals under section 158(d), 1291, or 1292 of this title or by the Supreme Court of the United States under section 1254 of this title.

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STATEMENT OF THE CASE

The Petitioner herein, FoxMeyer Drug Company ("FoxMeyer"), is a multi-billion dollar pharmaceuticals distributor, and was a major supplier of goods to Phar-Mor, Inc. ("Phar-Mor"), the nation's third largest retail drug chain. FoxMeyer was allegedly owed over $72 million when Phar-Mor entered bankruptcy following disclosure of a financial fraud by Phar-Mor's management. The bankruptcy was filed on August 17, 1992, in the Bankruptcy Court for the Northern District of Ohio. (App. 1, Item 1, Ex. 2.) Phar-Mor continues to operate as a Debtor-in-Possession under chapter 11 of the Bankruptcy Code.

Accountant Liability Cases

In the aftermath of the fraud and bankruptcy, Phar-Mor and many of its suppliers (such as Petitioner), lenders and investors have sued Coopers & Lybrand ("Coopers"), Phar-Mor's auditor. The first such case was brought by Phar-Mor in Pennsylvania state court, and removed to the District Court for the Western District of Pennsylvania as an action "related to" the Phar-Mor bankruptcy under 28 U.S.C. § 1334(b). (App. 1, Item 1,. Ex. 8.) Thereafter, many similar cases were brought in state and federal courts around the country. The plaintiffs (including Petitioner) claim that they did business with Phar-Mor -- buying stock, making loans, selling goods, and so on -- in reliance on Phar-Mor's pre-bankruptcy financial statements. These statements are alleged to have been negligently audited by Coopers. Some parties, including Phar-Mor itself, claim that Coopers' negligence actually caused the bankruptcy. Damages claimed by Petitioner and other supplier-plaintiffs are based on goods shipped but not paid for at the time of Phar-Mor's bankruptcy. The same amounts are claimed as debts in the Phar-Mor bankruptcy proceeding.

The Judicial Panel on Multidistrict Litigation ordered transfer of all cases arising from the Phar-Mor fraud and bankruptcy to the United States District Court for the Western District of Pennsylvania (Ziegler, J.) pursuant to 28 U.S.C. § 1407. The MDL Panel held that, while legal theories varied among the cases, they all "share factual questions concerning the financial condition of Phar-Mor and the knowledge that defendants had or should have had." (Id. Ex. 10.) Thirty-three separate actions, some with multiple plaintiffs and one purporting to be a class action on behalf of hundreds of Phar-Mor creditors, are now consolidated for pre-trial purposes in the District Court in Pittsburgh.

The chapter 11 bankruptcy case and the accountant liability case against Coopers are avowedly part of a two-prong strategy to maximize the value of the Phar-Mor Estate and the potential recovery to creditors. Although Petitioner has offered various adjectives to minimize the relationship between the anti-Coopers case and the Phar-Mor bankruptcy -- "contingent," "hypothetical," etc. -- the participants and the courts below all know that this is not correct, and have recognized bankruptcy related jurisdiction and the appropriateness of adjudication in a single forum. The following is a short list of facts and circumstances that supported these rulings both in general and as to FoxMeyer's claims at the time the MDL Panel ordered transfer and the District Court sustained jurisdiction:

- Phar-Mor itself has described its accountant's liability claims against Coopers as the "single largest asset" of the Phar-Mor bankruptcy estate (id. Ex. 9), and a principal potential source of funds to pay creditors such as FoxMeyer;

- FoxMeyer is in fact the largest trade creditor in the Phar-Mor bankruptcy, with over $70 million in claims for goods sold and delivered (id. Ex. 13); its claims against Coopers are attempts to find an alternate source of payment of its Phar-Mor debt;

- Accordingly, as the District Court held, success by FoxMeyer in its accountant's liability case will take it out of the creditor claims pool, "positively" "directly" altering the rights of all other creditors and "directly" affecting the bankruptcy case; although FoxMeyer decries this impact as "contingent," the main "contingency" is that FoxMeyer will succeed in what it is trying (very hard) to accomplish, i.e., to get payment from Coopers on account of the debts incurred by Phar-Mor;

- Further, in the FoxMeyer case and in general, Coopers has asserted that any recovery by individual creditor-plaintiffs will be an offset and recoupment against any judgment against Coopers that Phar-Mor itself may obtain; this will occur both under normal recoupment principles and because Phar-Mor is claiming as an element of its own damages the same debts on which creditor-plaintiffs seek recovery;

- Accordingly, any recovery by FoxMeyer against Coopers will reduce dollar-for-dollar Phar-Mor's eventual recovery and the proceeds flowing into the Phar-Mor bankruptcy estate; again, the main "contingency" is that the creditors suing

Coopers will accomplish what they are trying to accomplish, i.e., to get recovery from Coopers based on Phar-Mor's debts;

- The bankruptcy and creditor impact of the accountants liability against Coopers litigation was formally recognized by the Official Committee of Unsecured Creditors, when it sought to intervene in the MDL litigation on the ground that creditor rights in the bankruptcy would be impacted (see App. 1, Item 2);

- FoxMeyer, as the largest trade creditor and a continuing supplier to Phar-Mor in chapter 11, is chairperson of the Creditors Committee (App. 1, Item 1, Exs. 1, 4, 14); its present pleas for remand will thus represent something of a procedural grand-slam: keeping its direct case against Coopers in FoxMeyer's Texas court (on the theory that the case is not bankruptcy-related), meanwhile having its creditor interests represented through Creditors Committee intervention in the MDL case against Coopers (on the theory that Phar-Mor creditor interests are at stake).

As the case has progressed subsequent to Judge Ziegler's jurisdictional ruling, the relatedness of the bankruptcy and the accountants liability actions has been further evidenced in the following ways, among others:

- The Third Circuit has now ruled that Phar-Mor's case against Coopers is an "adversary proceeding" within the meaning of the Bankruptcy Code and Rules, thus giving the

Creditor's Committee (chaired by FoxMeyer) an absolute right to intervene (App. 1, Item 2);

- FoxMeyer and Phar-Mor are now in litigation in the Bankruptcy Court over delivery and payment for about $20 million of the goods that are the basis for FoxMeyer's claims against Coopers, with FoxMeyer claiming a priority right to payment (ahead of other creditors), while Phar-Mor counter-claims that FoxMeyer received preferential payments, which are recoverable by the Estate (App. 1, Item 3);

- This creates other forms of potential impact of FoxMeyer's action against Coopers, as a victory by FoxMeyer would now clearly enrich the Phar-Mor Estate by whatever amount FoxMeyer is due on its priority claims; again, the main "contingency" is whether Petitioner succeeds in what it is trying to do -- to get Coopers to pay for the underlying goods shipped to Phar-Mor;

- In deference to its bankruptcy court litigation with Phar-Mor, FoxMeyer has begun to have its bankruptcy counsel present for testimony in the MDL accountant liability case that might impact bankruptcy court litigation (App. 1, Item 4); no one has objected to the presence of FoxMeyer's bankruptcy counsel at accountant liability depositions on the ground that the bankruptcy impact of the testimony was "contingent" or that it "might not" affect the bankruptcy case.

In sum, the accountants liability cases and Phar-Mor bankruptcy arise from the same core of operative facts, are inextricably intertwined both legally and factually, and are part of the same case and controversy. As the cases progress toward final judgment, further effects and relationships will be identified. These effects will become concrete and measurable in dollars as the rights of the multitude of persons impacted by the Phar-Mor financial disaster are established by the courts.

Procedural History of the Foxmeyer Case

Petitioner commenced its case against Coopers in Texas state court about six months after the Phar-Mor bankruptcy, with damages claimed based on pre-bankruptcy shipment of goods to Phar-Mor. Coopers removed to federal court under 28 U.S.C. § 1452(a), on the ground that Petitioner's case was an action "related to" the Phar-Mor bankruptcy within the meaning of 28 U.S.C. § 1334(b)[1]. Over Petitioner's objections, its case and pending motion to remand and/or abstain were transferred by the MDL Panel to the Western District of Pennsylvania, to be decided with the similar remand/abstention motions of other state plaintiffs.

Judge Ziegler, as transferee judge, denied the remand and/or abstention motions of Petitioner and the other state plaintiffs, finding that their actions were "related to" the Phar-Mor bankruptcy within the meaning of 28 U.S.C.

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[1] Subsequent to removal, Coopers impleaded Phar-Mor as a third party defendant. If Coopers had not removed Phar-Mor undoubtedly would have done so under § 1452 (a), as it has in similar instances.

§ 1334(b). The court applied the test set forth in the governing decision of the Third Circuit in Pacor, Inc. v. Higgins, 743 F.2d 984 (3d Cir. 1984), which holds that a civil action is "related to" a bankruptcy case where the outcome "could conceivably have an effect on the estate being administered." The court found that the Pacor test carried out the legislative purpose of avoiding the inefficiencies of "piecemeal adjudication" of matters affecting the administration of bankruptcies. The court noted that Pacor had specifically contemplated jurisdiction where a bankruptcy creditor seeks recovery from a third party of amounts owed by the bankrupt. (District Court Opinion, Petition App. 1 at 3-7.)

Turning to FoxMeyer's alternative motion to abstain, court held that 28 U.S.C. § 1334(c)(2), did not apply to removed cases, which are governed instead by § 1452(b) which specifically addresses remand to state court following removal. Further, the court found that exercise of jurisdiction posed no threat of inconsistent judgments or of friction between state and federal courts, since no action was pending in state court. (Id. at 7-9.)

Analyzing equitable factors under § 1452(b) the court found that the equities weighed in favor of retaining the action in federal court. FoxMeyer's action, like all the other cases in the MDL litigation, raised the same central issues as to fraud and accountants liability. Remand would waste judicial resources, since the same evidence would have to be produced and many of the same witnesses would need to testify in the remanded action as in the federal MDL litigation. The court noted that it was more familiar with the subject matter of the case than a Texas state court would be. Finally, the court found that FoxMeyer, as a corporation engaged in business throughout the United States, would not be unduly prejudiced by litigation of its claims in

Pennsylvania. (Id. at 10-12.) The District Court's decision did not include any discussion of "constitutional" issues, as none had been raised by Petitioner, which had argued only that the facts of this case fall outside the statutory grant of jurisdiction in 28 U.S.C. § 1334(b), as interpreted by the Third Circuit in Pacor.

Dissatisfied with this ruling, and apparently insensitive to litigation cost, Petitioner has now invoked every possible means of obtaining review of the District Court's interlocutory order denying remand to state court and/or abstention. First, Petitioner sought certification for interlocutory appeal pursuant to 28 U.S.C. § 1292(b), asserting (as before) that the District Court had failed to interpret 28 U.S.C. § 1334(b) and (c)(2) correctly, and that remand was required under Pacor's interpretation of § 1334(b). This effort to obtain § 1292(b) interlocutory appeal was in derogation of the relevant statutes, 28 U.S.C. §§ 1452(b) and 1334(c)(2), which explicitly bar such review.

Petitioner then sought mandamus in the Third Circuit. This request was in derogation of Third Circuit precedents that reserve mandamus for clear judicial abuses of power and disregard of law, and hold that any burden of awaiting normal appellate review under the finality rule are not a ground for mandamus. The Third Circuit denied mandamus without opinion on March 25, 1994.

Thereafter, the present Petition for certiorari and/or mandamus was filed.

ARGUMENT

I. MANDAMUS REVIEW OF AN INTERLOCUTORY ORDER DENYING REMAND TO STATE COURT WOULD BE UNPRECEDENTED, AND WOULD BE CONTRARY TO LONG-STANDING LEGISLATIVE AND JUDICIAL POLICIES.

A. Mandamus Is Not a License to Evade the Final Judgment Rule, and Is Particularly Disfavored as a Vehicle to Obtain Review of Refusals to Remand or Abstain.

The vice of mandamus is that, when directed to federal courts, it tends to evade the long-standing rule of finality, which postpones appellate review until rights have been finally adjudicated. Mandamus is accordingly restricted to truly extraordinary cases of "clear and indisputable" abuses by lower courts, where an aggrieved party has no other adequate avenue to obtain review. E.g., Kerr v. United States District Court, 426 U.S. 394, 403 (1976) (affirming denial of mandamus); Gulfstream Aerospace Corp. v. Mayacamas Corp., 485 U.S. 271, 289 (1988) (denying mandamus to review abstention decision); Will v. United States, 389 U.S. 90, 96 (1967); Allied Chemical Corp. v. Daiflon, Inc., 449 U.S. 33 (1980) (per curiam); see generally, Stringfellow v. Concerned Neighbors in Action, 480 U.S. 370 (1987) (vices of interlocutory review); Firestone Tire & Rubber Co. v .Risjord, 449 U.S. 368, 380 (1981).

Where a party challenges denial of remand to state court, this Court has clearly stated that mandamus is not available to obtain interlocutory review. Thus, in Roche v. Evaporated Milk Association, 319 U.S. 21, 30 (1943) (cited by FoxMeyer at p. 23 of the Petition), the Court stated as follows:

> "For that reason [respect for the finality rule] this Court has consistently refused to sustain the use of mandamus as a means of reviewing the action of a district court in denying a motion to remand a case to the state court from which it had been removed." (Citations omitted).

Accord, Ex Parte Harding, 219 U.S. 363, 369 (1911) ("there is nothing peculiar in an order refusing to remand which differentiates it from any other order or judgment of a court of the United States concerning its jurisdiction"); In Re Ivy, 901 F.2d 7, 10 (2d Cir. 1991) (denial of remand may not be reviewed by mandamus).

Although Petitioner apparently advocates broad use of mandamus where a party alleges a "jurisdictional" error (Petition at 23-27), this is not supported by precedent and would undercut the normal prerogative of a federal court to "determine its own jurisdiction." E.g., Ex Parte Harding, supra, 219 U.S. 363, 364 (1911); see generally, Land v. Dollar, 330 U.S. 731 (1947); 13A Wright, Riller & Cooper, Federal Practice and Procedure § 3536 at 535 (2d ed. 1984) (if jurisdiction is questioned, "the court has the power and the duty, subject to review, to determine the jurisdictional issue").

Nor would mandamus have been appropriate even if Petitioner could show a grievous error in the District Court's ruling. In American Airlines, Inc. v. Forman, 204 F.2d 230, 232 (3d Cir. 1953), the Third Circuit described the narrow role of mandamus as follows:

> "The relief sought here [by mandamus] is not in aid of our appellate jurisdiction. Rather, it is an unwarranted anticipation of that jurisdiction.

* * *

> "The challenged assumption or denial of jurisdiction must be so plainly wrong as to indicate failure to comprehend or refusal to be guided by unambiguous provisions of a statute or settled common law doctrine. If a rational and substantial legal argument can be made in support of the questioned jurisdictional ruling, the case is not appropriate for mandamus . . . even though on normal appeal a reviewing court might find reversible error."

Accord, Pfizer, Inc. v. Lord, 522 F.2d 612, 615 (8th Cir. 1975), cert. denied, 424 U.S. 950 (1976) (quoting Forman) (writ to review jurisdiction over foreign governments under the Clayton Act denied); American Fidelity Fire Ins. Co. v. United States District Court, 538 F.2d 1371 (9th Cir. 1976).

Petitioner's citation to Thermtron Products, Inc. v. Hermansdorfer, 423 U.S. 336 (1976), only shows the great gulf separating the present case from anything remotely suggestive of mandamus. The respondent district judge in Thermtron, having obtained jurisdiction on removal, remanded the case back to state court due to his "crowded docket." (Id. at 340.) This decision was in clear disregard of the governing statute and was based on grounds which the court "had no authority to consider." (Id. at 350.) The extraordinary circumstances of Thermtron were emphasized again in the later case of Carnegie-Mellon University v. Cohill, 484 U.S. 343, 356 (1988), where the Court stated that "federal courts have no greater power to remand cases because of an overcrowded docket than they have to dismiss cases on that ground." Further underlying the decision in Thermtron was the fact that, absent mandamus review, the party aggrieved by the clear and seemingly intentional

disregard of law would have no opportunity for appellate review, since the remanded case would not thereafter receive a final order from any federal court.[2]

The present case, by contrast, shows a district judge carefully following the governing jurisdictional statute as interpreted by controlling Third Circuit precedent. The ruling is also in accord with the rule followed in other Circuits. (See Point II, infra.) Such rulings may be reviewed only by appeal from a final judgment.

B. Purported Burdens of Litigation Have Consistently Been Rejected as a Ground for Mandamus.

The supposed burdens and inconveniences of awaiting final judgment (Petition at 23 - 25) which could equally be raised by any unsuccessful applicant for remand or abstention have not been found to justify mandamus review, even when asserted by parties more sensitive to cost than a multi-billion dollar company such as Petitioner FoxMeyer. E.g., Roche v. Evaporated Milk Ass'n, 319 U.S. 21, 30 (1943) (reversing mandamus; "Respondents stress the inconvenience of requiring them to undergo a trial in advance

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[2] The other cases cited by Petitioner are equally unhelpful to its position. As noted above, Petitioner apparently did not notice the passage in Roche v. Evaporated Milk Ass'n, 319 U.S. 21, 30 (1943), which virtually bars use of mandamus in denial of remand cases, such as the present case. Petitioner also cites Hoffman v. Blaski, 363 U.S. 335 (1960), in which the Court noted that use of mandamus as a review mechanism was not contested (id. at 340), and that the Supreme Court's grant of certiorari review was based on the "great conflict and confusion" that had arisen in the lower courts. (Id. at 339n.8.)

of an appellate determination of the challenge now made. . . .But that inconvenience is one which we must take if Congress contemplated it providing that only final judgments should be reviewable."); Bankers Life & Casualty Co. v. Holland, 346 U.S. 379, 383-84 (1953) (denying mandamus; "it is established that the extraordinary writs cannot be used as a substitute for appeals, even though hardship may result from delay and perhaps unnecessary trial"); Ex Parte Park Square Automobile Station, 244 U.S. 412, 414-15 (1917) (mandamus not available despite claim that party would be forced to undergo trial in the wrong state); see also, Stringfellow, supra, 480 U.S. 370, 376-77 (1987) (rejecting argument that "complex litigation" justifies exception to final order rule); Van Cauwenberghe v. Baird, 486 U.S. 517, 524 (1988) (even litigants with meritorious claims for dismissal, "must abide by the district court's judgments, and suffer the concomitant burden of a trial"). Although Petitioner stresses the supposed complexity of the MDL litigation, this factor actually supports strict application of the finality rule. E.g., Stringfellow, supra, 480 U.S. at 376-77; In re Recticel Foam Corp., 859 F.2d 1000, 1006 (1st Cir. 1989) ("the importance of the finality requirement is at its zenith in large cases such as this").

Moreover, despite Petitioner's statements about litigation burdens, the truth is that FoxMeyer has been subject to burdens similar to those that state litigation would entail, and is the beneficiary of efficiencies associated with the consolidated pre-trial proceedings. Thus, deposition witnesses have testified in their home cities, with Coopers and other parties going to Texas to depose FoxMeyer witnesses, and to Pittsburgh for the testimony of Coopers and Phar-Mor witnesses who live in that city or nearby Youngstown, Ohio, Phar-Mor's headquarters. Where other plaintiff witnesses have been deposed, FoxMeyer has chosen not to attend, just as if the cases had not been consolidated.

Still, it gets the benefit of transcripts and document discovery generated by all other parties. FoxMeyer also has the benefit of an intensive plaintiff-driven effort to challenge the Coopers audits. All parties have the benefit of a District Judge who knows all facets of the case, and has placed it on a fast track, with completion of fact discovery scheduled for September 30, 1994.

In sum, even if litigation burden were a ground for mandamus, a proposition always rejected by this Court, FoxMeyer cannot claim any unusual burdens in this case. Litigation is never cost free, especially for a commercial litigant seeking a $72 million recovery in a financial fraud and accountant malpractice case that would be deemed complex in any court. Nor can FoxMeyer, which for years pursued (and still pursues) profitable dealings with the Pennsylvania- and Ohio-based Phar-Mor, and now seeks payment for goods shipped to Phar-Mor, be surprised if it has to submit to a venue chosen by the bankrupt Phar-Mor to get recovery on these claims.[3]

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[3] Although the Petitioner repeatedly refers to this case as a purely "local" dispute (e.g., Petition at 7), it is not clear what this means in the context of a $2.7 billion contract for sales of goods between a national distributor (FoxMeyer) and a national retailer (Phar-Mor), and the alleged negligence of a national accounting firm ("Coopers'). Perhaps FoxMeyer means that it was able to find an office of Coopers in Dallas (as could plaintiffs in many other cities) on which to serve a summons. In fact, the challenged audit work was done out of Coopers' Pittsburgh office, and the resulting opinion was rendered to Phar-Mor's Board of Directors in Pittsburgh. The MDL Panel and the District Court correctly found that Pittsburgh is the factual center and most suitable venue for this case.

C. Constitutional Issues Are Not Ripe for Review at This Stage.

Due to the unusual and accelerated procedural path employed by Petitioner, neither of the Courts below has addressed the constitutional arguments now put forward. (E.g., Opinion below, Petition App. 1.) Indeed, on appeal from final judgment, the Third Circuit might well accept Petitioner's contentions that the District Court incorrectly interpreted § 1334(b) and/or deem the potential impacts here to be excessively "contingent." Further, as has occurred since the District Court's decision sustaining jurisdiction, additional facts or relationships to the bankruptcy may come into existence or may be discovered that could have a bearing on the jurisdictional discussion, and render unnecessary the adjudication of constitutional questions.

In light of the foregoing, it would be appropriate at this juncture to defer consideration of any constitutional arguments until final judgment, which may render moot or place in a more complete and sharply focused legal and factual setting any remaining constitutional issues. See generally, Finley v. United States, 490 U.S. 545, 549 (1989) (declining to reach jurisdictional issues under article III where statutory ground was available); Neese v. Southern Railway Co., 350 U.S. 77, 78 (1955) (per curiam); Ashwander v. Tennessee Valley Authority, 297 U.S. 288, 346-47 (1936); Brotherhood of Locomotive Firemen & Enginemen v. Bangor & Aroostook Railroad Co., 389 U.S. 327 (1967) (per curiam).

II. THE DISTRICT COURT'S DECISION DID NOT DISREGARD LAW OR USURP JUDICIAL POWER, BUT FOLLOWED GOVERNING THIRD CIRCUIT PRECEDENT, ADOPTING A JURISDICTIONAL RULE THAT IS ENDORSED BY COURTS THROUGHOUT THE COUNTRY.

A. The District Court Invoked and Applied the Jurisdictional Test That Prevails in the Third and All Other Circuits.

FoxMeyer seeks review of the Third Circuit's denial of its petition for mandamus on the grounds that the lower court's opinion "dramatically expand[s]" the scope of subject matter jurisdiction. (Petition at 7). As shown in detail below, however, the court's decision that FoxMeyer's action is "related to" Phar-Mor's bankruptcy was well within settled and consistent case authority, which carries out Congress's intent in enacting § 1334(b).

The circuit courts are in full accord concerning the scope of the federal courts' subject matter jurisdiction over bankruptcy-related proceedings under 28 U.S.C. § 1334(b). The First, Second, Fourth, Fifth, Sixth, Seventh, Eighth, Ninth, Tenth, and Eleventh Circuits have all endorsed the standard announced by the Third Circuit in its Pacor decision, that a proceeding that could "conceivably" affect the outcome or administration of a federal bankruptcy case is sufficiently "related to" the bankruptcy case to support jurisdiction. See In re Cuyahoga Equipment Corp., 980 F.2d 110, 114 (2d Cir. 1992); In re G.S.F. Corp., 938 F.2d 1467, 1475 (1st Cir. 1991); In re Gardner, 913 F.2d 1515, 1518 (10th Cir. 1990); In re Lemco Gypsum, Inc., 910 F.2d 784, 788 (11th Cir. 1990); In re Fietz, 852 F.2d 455, 457 (9th Cir. 1988); In re Wood, 825 F.2d at 90, 93 (5th Cir. 1987); In re

Dogpatch U.S.A., Inc., 810 F.2d 782, 786 (8th Cir. 1987); A.H. Robins Co., Inc. v. Piccinin, 788 F.2d 994, 1002 n. 11 (4th Cir.), cert. denied, 479 U.S. 876 (1986).

Contrary to the Petitioner's references to "boundless" jurisdiction, in fact, test is not satisfied by highly attenuated or remote connections. See In re Salem Mortgage Co., 783 F.2d 626, 634 (6th Cir. 1986); In re Xonics, Inc., 813 F.2d 127 (7th Cir. 1987). Indeed, Pacor itself, which first used the word "conceivably," found no jurisdiction on the case before it due to the weak and speculative bankruptcy connection.

This standard carries forward Congress's intention in granting the federal courts jurisdiction over bankruptcy-related proceedings. "Congress was concerned with the inefficiencies of piecemeal adjudication of matters affecting the administration of bankruptcies and intended to give federal courts the power to adjudicate all matters having an effect on the bankruptcy." In re Wood, 825 F.2d at 92, citing S. Rep. No. 989, 95th Cong., 2d Sess., 153-54 (1978), reprinted in 1978 U.S. Code Cong. & Admin. News 5787, 5939-40. Accord, Northern Pipeline Construction Co. v. Marathon Pipe Line Co., 458 U.S. 50, 87 n.40 (1982) ("[W]e note that one of the express purposes of the [Bankruptcy Reform Act of 1978] was to ensure adjudication of all claims in a single forum and to avoid the delay and expense of jurisdictional disputes.").[4]

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[4] As FoxMeyer apparently concedes, Marathon did not contain anything that conflicts with the Circuit Courts' broad interpretation of jurisdiction over bankruptcy-related cases. See Petition at 15-16, and 16 note 6. Accord, Wood, 825 F.2d at 92-93 ("The

(Footnote continued)

The particular bankruptcy relationship identified by the District Court was also squarely within governing precedent. The Third Circuit in Pacor had devoted specific attention to the situation where a plaintiff is also a bankruptcy creditor. "Related to" jurisdiction exists because such an action:

> will necessarily affect that creditor's status vis-a-vis other creditors, and administration of the estate therefore depends upon the outcome of that litigation." (Pacor, supra, 743 F.2d at 995-96.)

This creditor-plaintiff effect is clearly evident in the present case, where FoxMeyer seeks payment from Coopers for goods delivered to Phar-Mor, meanwhile pursuing the same recovery in Phar-Mor's bankruptcy. If it succeeds against Coopers, this will effectively satisfy its bankruptcy claim as a trade creditor to Phar-Mor, thus taking FoxMeyer out of the creditor pool and altering the rights of all other creditors. See, e.g., In re Showcase Natural Casing Co., 54 B.R. 142, 143 (Bankr. S.D. Ohio 1985) (judgment "will necessarily reduce plaintiff's claim against the debtor"); Howard Brown Co. v. Reliance Ins. Co., 66 B.R. 480, 481-82 (E.D. Pa. 1986) ("resolution of this case may affect plaintiff's status as creditor . . . by reducing or eliminating its claim against the bankruptcy estate"); In re M. Paolella & Sons, Inc., 85 B.R. 965, 972 (Bankr. E.D. Pa. 1988) ("if plaintiffs

(Footnote continued from previous page)

holding in Marathon suggests no concern over the constitutionality of the scope of bankruptcy jurisdiction defined by Congress.").

prevail . . . their unsecured claims against the estate will be reduced to the extent damages are recovered"); Dak Mfg. Corp. v. Coordinated Components Corp. (In re Dak Mfg. Corp.), 73 B.R. 917, 921 (Bankr. D.N.J. 1987).

Although this creditor-plaintiff effect was correctly viewed as dispositive in favor of jurisdiction based on Pacor, the District Court could equally have sustained jurisdiction on several other recognized grounds. Thus, the fact that Coopers may use any eventual FoxMeyer recovery as a setoff and recoupment against any Phar-Mor recovery exemplifies the strongest form of bankruptcy-related jurisdiction, where the outcome of litigation could effect property or value coming into the estate.[5] Other courts have identified the bankrupt debtor's participation in underlying event and the fact that a lawsuit involves the "joint conduct" of the debtor

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5 E.g., Diamond Mortgage Corp. v. Sugar, 913 F.2d 1233, 1239 (7th Cir. 1990) cert. denied, 111 S. Ct. (1991; (jurisdiction where action "may have direct and substantial impact on the asset pool available for distribution to the estate"); Matter of Xonics, Inc., 813 F.2d 127, 131 (7th Cir. 1987) (jurisdiction clear where dispute "affects the amount of property available for distribution"); Gentilcore v. Dismondi & Margolis, Adv. No. 92-0021, 1993 WL 5897 at *3 (Bankr. W.D. Pa. Jan. 5, 1993) (creditors' claim against debtors' law firm for breach of fiduciary duty "affects both funds available for distribution and the claims against them."); In re Dak Mfg. Corp., 73 B.R. 917, 921 (D.N.J. 1987) (finding jurisdiction where defendant claimed that judgment against him would create "setoff" against the Debtor").

and non-debtor defendants as a factor supporting jurisdiction.[6]

In sum, the present case clearly supports "related-to" jurisdiction under the Third Circuit's test and under any recognized interpretation of 28 U.S.C. § 1334(b).

B. Petitioner's Attacks on the District Court Decision Are Confused and Self-Contradictory.

1. Outcomes and Impacts of Litigation Are Always Contingent.

At some points in the Petition, it seems that Petitioner objects mainly to the "contingent" nature of the potential effects on other bankruptcy creditors that Pacor and the District Court identified. Several adjectives are employed to express this argument: "hypothetical," "indirect," "conceptually limitless," "boundless," "collateral," "remote," etc. (Petition at 9-16.) The main point of attack is the word "conceivable" which has been used by most of the Courts of Appeals, mainly to express the ideas that, (i) legislative intent would be defeated by a narrow view; and (ii) a sound jurisdictional test can't require forecasts about the merits of

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6 E.g., In re Wood, supra, 825 F. 90, 94 (finding jurisdiction over claims "resulting from the joint conduct of the debtor and non-debtor defendants"); In re Salem Mortgage Co., supra, 783 F.2d 626, 635 (6th Cir. 1986) (noting that bankrupt parties had close and "intertwined" relationship to litigating parties); In re Cardinal Industries, Inc., 126 754, 758 (S.D. Ohio 1991) ("intertwined relationship . . . tends to uphold a finding of jurisdiction"); In re Zamost, 7 B.R. 859 (Bankr. S.D. Cal. 1980).

the case or spend too much time at the threshold trying to predict precise impacts in the fluid environment of a bankruptcy.

The problem with Petitioner's approach is that it is more a semantical dispute over adjectives than a legal issue. Everyone agrees (including the District Court, the Third Circuit, and the other Courts of Appeals) that there must be a sufficiently strong and non-speculative potential impact for a case to be one "related to" a title 11 case within the meaning of 28 U.S.C. § 1334(b). Even FoxMeyer seems to agree that a stronger or less "contingent" effect in this case would support jurisdiction. Petitioner's real complaint is that it couldn't convince the District Court of its factual contentions on the question of whether the effect in this case is strong enough and likely enough.

The District Court clearly has the better side of the factual debate. Although Petitioner has strained to make lists of "contingencies" (e.g., Petition at 6), the main contingency is that Petitioner will succeed in what it has set out to do, i.e., recover payment from Coopers for the debts incurred by Phar-Mor. It would be a strange form of jurisdiction indeed that could be defeated by the observation that a plaintiff that it might lose its case. Nor would any sound jurisdictional doctrine demand inquiry at the jurisdictional stage into the other contingencies identified by Petitioner, including such future events as whether there will ultimately be funds to distribute to trade creditors and other matters that must necessarily await bankruptcy administration.

In reality, uncertainties and contingencies as to outcome and ultimate effect are an integral part of any litigation and any bankruptcy. They can't be eliminated by any jurisdictional test. Nor would they be eliminated (only turned upside-down) by the test FoxMeyer seems to advocate

here, i.e., that jurisdiction would be defeated wherever a case "conceivably might not" impact a pending bankruptcy proceeding.

2. Any Supposed "Federal Interest" Test is Clearly Met.

At other points in the Petition, FoxMeyer seems to argue that there should be a "federal interest" analysis, using terminology that is sometimes seen in cases of federal question jurisdiction under 28 U.S.C. § 1331, but has not generally been used in discussion of § 1334(b). If jurisdiction were to be analyzed in such terms, however, it would be beyond question that there is a "federal interest" in the administration of bankruptcy estates, as amply evidenced by the massive Title 11 of United States Code (the "Bankruptcy Code") and the constitutional provision (Art. I, Sec. 8, Cl. 4) which grants power over bankruptcies to the federal government. The analysis employed by the District Court, following the teaching of the Third Circuit in Pacor, could easily be fit into this approach, because it is founded on identifying impacts on the federal bankruptcy administrative process. As stated above, there are many such potential impacts in this case, including some that were identified in the District Court decision and some that have become apparent subsequently, and each such impact implicates the federal interest in bankruptcy administration.

3. The Views Expressed in the Supposed Legislative History Cited in the Petition Are Partisan Comments That Have Been Rejected by Congress and the Courts.

At other points, Petitioner cites "legislative history" in support of the view that state created rights may not be brought into federal courts at all under the heading of bankruptcy jurisdiction. (Petition at 11-12, 19.) This

material seems to contradict FoxMeyer's main position that exercise of jurisdiction over state claims would be acceptable if the bankruptcy nexus were less "contingent."

In fact, this "legislative history" represents a narrow view of jurisdiction that was rejected in 1978, when the Bankruptcy Code and jurisdictional scheme was enacted, and again in 1984, when bankruptcy-related jurisdiction was reaffirmed following this Court's decision in Northern Pipeline Const. Co. v. Marathon Pipe Line Co., 458 U.S. 50 (1982). Although FoxMeyer quotes remarks by Senator Hatch supposedly made during floor debates, this Court has refused to accept comments by individual congressmen as a controlling guide in construing statutes.[7] These remarks are the only basis for FoxMeyer's assertion that "[i]t was unquestioned [in Congress] that applying 'related to' jurisdiction in cases . . . involving only state-law claims between nondiverse and nonbankrupt parties would violate Article III § 2." (Petition at 12.) In fact, courts and commentators have agreed that "related proceedings" include suits between third parties that affect the administration of a Title 11 case. See 1 Collier's on Bankruptcy ¶ 3.01[1][c][iv] at 3-29 through 3-31, citing cases.

FoxMeyer's jurisdictional propositions, which directly contradict § 1334(b) and years of jurisprudence under it, actually originated not in legal precedents but in statements of Senator Hatch and other congressional opponents of broad bankruptcy jurisdiction, who saw in the Marathon decision

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7 See Bath Iron Works Corp. v. Director, Office of Workers' Compensation Programs, 113 S.Ct. 692, 700 (1993); Weinberger v. Rossi, 456 U.S. 25, 35 n. 5 (1982).

and the resulting 1984 amendments an opportunity to reassert the narrow jurisdictional view, which had been rejected in 1978.[8] While this effort failed to dislodge broad jurisdiction, it produced some special exemptions for personal injury and wrongful death claims (e.g., U.S.C. § 157(b)(2)(B)) and a so-called "mandatory abstention" provision, the present § 1334(c)(2). In the process, a number of anti-jurisdictional statements were placed in the Congressional Record and similar sources of "legislative history."[9] Attempting to track and understand these demonstrably contradictory and incorrect statements, which betray ignorance of both Marathon and elementary principles of jurisdiction, one court stated that "one has to wonder whether, in 1984 at least, Congress even knew its mind," and called for repeal of § 1334(c)(2). In re Branded Products, Inc., 142 B.R. 936, 941-944, 946n.14 (Bankr. W.D. Tex. 1993); see also, Collier on Bankruptcy ¶ 3.01 [3][b] at 3-77.

In fact, the idea that state law claims are outside the permissible bankruptcy subject matter jurisdiction (absent diversity or a federal question) is nonsense. State law claims

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8 Jurisdiction over cases "related to cases under title 11," now embodied in § 1334(b), was first enacted in 1978 as 28 U.S.C. § 1471(b).

9 Indeed, these statements are not even Committee Reports or other attempts to report any consensus, but merely the views of independent legislators placed in the Congressional Record. See 1984 U.S. Code, Cong. and Admin. News at 576, et seq. There is no way to know at this point whether these statements were actually spoken aloud in Congress (written materials are often submitted without public airing), who if anyone was present to hear and to what extent they agree or conflict with the views of the hundreds of other legislators who voted on the 1984 amendments.

are adjudicated all the time in the bankruptcy process, particularly in the resolution of claims, which almost always involve torts, contracts or other state created rights. Indeed, the narrow view of jurisdiction, rejected by Congress both in 1978 and in 1984, would create an unworkable system where:

> "all claims litigation should proceed via law suits in state court before being handled in bankruptcy, a reading that would convert bankruptcy into a cumbersome, hyperextensive and thoroughly impracticable remedy completely out of step with the Bankruptcy Code itself. No court has ever given to section 1334(c)(2) the interpretation here suggested . . . ."

In re Branded Products, Inc., 154 B.R. 936, 942-43 n. 14 (Bankr. W.D. Tex. 1993).

Nor has this Court ever read the Constitution to confine the federal courts' power to adjudicate cases affecting bankruptcy as FoxMeyer asserts. Marathon, for example, did not hold that the broad grant of jurisdiction to bankruptcy courts was inconsistent with Article III of the Constitution. Indeed, the Marathon plurality held that the claim at issue there "may be adjudicated in federal court on the basis of its relationship to the petition for reorganization." Id. at 72, n.26. Jurisdiction under Article III, section 2 of the Constitution has been broadly construed. See Verlinden B.V. v. Central Bank of Nigeria, 461 U.S. 480, 492 (1983); Osborn v. Bank of United States, 9 Wheat. 738, 822 (1824). This Court has never doubted Congress's power to confer jurisdiction on federal courts in matters affecting the administration of bankruptcy estates. See Williams v. Austrian, 331 U.S. 642, 652-53 (1947) (where Congress had

exercised its bankruptcy powers to confer upon federal courts jurisdiction conditioned upon a defendant's consent, no independent ground for federal jurisdiction was required); Schumacher v. Beeler, 293 U.S. 367, 374 (1934) (same); National Ins. Co. v. Tidewater Co., 337 U.S. 582, 611-12 (Rutledge, J. concurring) (suit by trustee in federal court on action that debtor could have brought only in state court is one "arising under the laws of the United States").

4. "Abstention" Under § 1334(c)(2) Has Nothing to do with Subject Matter Jurisdiction Or Article III of the Constitution.

FoxMeyer seriously misunderstands the nature of subject matter jurisdiction and abstention when it repeatedly asserts that § 1334(c), which calls for "abstention" in certain circumstances, is "necessary to confine trial courts within the scope of their Article III authority." (Petition at 27; see id. at 7, 18.) This confuses the doctrine of abstention with that of jurisdiction. Rather, under traditional notions of abstention, a court declines to assert its otherwise valid subject matter jurisdiction over a particular matter, finding that the matter is better resolved in another court. See, e.g., Railroad Comm'n of Texas v. Pullman Co., 312 U.S. 496, 501 (1941) (abstention is a doctrine whereby federal courts, exercising a wise discretion, restrain their authority); Burford v. Sun Oil Co., 319 U.S. 315, 333 n.29 (1943) ("Equity's discretion to decline to exercise its jurisdiction may be

applied when judicial restraint seems required by considerations of general welfare.").[10]

Especially unsound is the idea (adopted by FoxMeyer from Senator Hatch) that, if there were a problem with subject matter jurisdiction, abstention under § 1334(c)(2) would do anything to solve it. It is axiomatic that subject matter jurisdiction is fundamental, cannot be conferred by waiver or consent of private parties, must be raised sua sponte, and must be raised at any time when a defect appears. It must also be raised by an appellate court after judgment, even if the parties and the lower court fail to notice a jurisdictional issue. E.g., Insurance Corp. of Ireland v. Compagnie Des Bauxites de Guinee, 456 U.S. 694, 702 (1982); UIW v. Gov't of Virgin Islands, 987 F.2d 162, 163 (3d Cir. 1992).

In contrast, § 1334(c)(2) expressly depends on such factors as a "timely motion of a party," and such criteria as whether a case is commenced in another court and can be "timely adjudicated." It then purports to insulate any rulings from appellate review. All these terms proclaim with crystal clarity that § 1334(c)(2) really is not about "subject matter

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10 It is a fundamental tenet of statutory construction that a particular statutory provision is not to be read in a way that frustrates the purpose of the statute. As this Court has written, "[I]n determining the meaning of a statute, we look not only to the particular statutory language, but to the design of the statute as a whole and to its object and policy." Crandon v. United States, 494 U.S. 152, 158 (1990); accord, Offshore Logistics, Inc. v. Tallentire, 477 U.S. 207, 228 (1986); Mastro Plastics Corp. v. NLRB, 350 U.S. 270, 285 (1956). Here, the relevant policy is to ensure the expeditious resolution of the debtor's bankruptcy and to avoid piecemeal litigation.

jurisdiction." To allow this clarity to be muddied by statements placed in the record by individual legislators exemplifies the mischief that can result from uncritical reliance on supposed "legislative history."[11]

In sum, any issue FoxMeyer has with subject matter jurisdiction should be raised, analyzed under the jurisdictional grant of § 1334(b) and rejected under its proper name, not through the proxy of "mandatory abstention."

Again, the District Court clearly made the correct decision in declining the invitation to abstain, relying on many cases holding that remand decisions are not subject to mandatory abstention under § 1334 (c)(2), but are governed by the statute that specifically treats remand of removed cases, 28 U.S.C. § 1452(b). Further, because lawsuits by Phar-Mor creditors against Coopers have continued to proliferate, a holding that the district court is required to abstain under § 1334(c)(2) would result in a multiplicity of state court actions, all addressing the very same events and transactions and posing the same central issues. These disparate state actions, in which Phar-Mor is or will become a third party defendant, would involve much the same evidence and many of the same witnesses, and could only prolong bankruptcy proceedings and delay their resolution.[12]

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11 E.g., Green v. Bock Laundry Mach. Co., 490 U.S. 504, 527 (1989) (Scalia, J., concurring); Note, Why Learned Hand Would Never Consult Legislative History Today, 105 Harv. L. Rev. 1005, 1017-21 (1992) (tracing the degradation and questionable reliability of many legislative materials.)

12 Coopers has been sued in state and federal courts in Texas, New Jersey, Pennsylvania, Ohio, Illinois New York and Kentucky.

(Footnote continued)

Furthermore, these disparate state actions would proceed alongside the continuing MDL litigation. In effect, FoxMeyer invites this Court to fire the starting gun of a race to judgment. The risk of inconsistent holdings and the waste of judicial resources--not to mention the frustration of the Bankruptcy Court's efforts to resolve the Chapter 11 case as expeditiously as possible -- are manifest.

FoxMeyer's assertion that § 1334(c)(2) is to be broadly applied also ignores this Court's repeated admonition that abstention is appropriate only in a narrow class of cases. "This Court repeatedly has stated that the federal courts have a 'virtually unflagging obligation' to exercise their jurisdiction except in those extraordinary circumstances 'where the order to the parties to repair to the State court would clearly serve an important countervailing interest.'" Deakins v. Monaghan, 484 U.S. 193, 203 (1988), citing Colorado River Water Conservation Dist. v. United States, 424 U.S. 800, 813 (1976); Moses H. Cone Memorial Hospital v. Mercury Construction Corp., 460 U.S. 1, 14-15 (1983).

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Section 1334(c)(2) provides for abstention only where timely adjudication in the state court is possible. In view of the multitude of state law cases all involving the same evidence and requiring testimony by many of the same witnesses, it is obvious that adjudication in the state courts could not possibly be "timely," but would inevitably frustrate the expeditious resolution of Phar-Mor's Chapter 11 bankruptcy.

CONCLUSION

For the above reasons, FoxMeyer's petition should be denied.

July 18, 1994

Respectfully submitted,

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Appendix 1

1. Affidavit of David W. Wiltenberg, and Exhibits thereto, filed on April 5, 1993, in Opposition to Plaintiff's Motion to Remand or, in the Alternative, Abstain and Remand.

2. Phar-Mor, Inc. v. Coopers & Lybrand, No. 93-3368 (slip op.) (United States Court of Appeals for the Third Circuit, filed April 11, 1994).

3. Complaint in Adversary Proceeding, Phar-Mor, Inc. v. FoxMeyer Drug Co., Adv. Pro. No. 94-4035.

4. Excerpts from transcripts of testimony of Robert L. King, former Chief Executive Officer of FoxMeyer.